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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PRISCELLA SAINTAL-SMITH,
Plaintiff(s),
v.
ALBERTSON'S, LLC, et al.,
Defendant(s).

Case No.: 2:18-cv-01478-APG-DJA

ORDER

Pursuant to 28 U.S.C. § 1915 Plaintiff is proceeding in this action *pro se* and has requested authority pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis*. (ECF No. 1). Plaintiff also submitted a complaint. (ECF No. 1-1).

I. In Forma Pauperis Application

Plaintiff filed the affidavit required by § 1915(a). (ECF No. 1). Plaintiff has shown an inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in forma pauperis* will be granted pursuant to 28 U.S.C. § 1915(a). The Clerk's Office is further **INSTRUCTED** to file the complaint on the docket. The Court will now review Plaintiff's complaint.

II. Screening the Complaint

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint pursuant to § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted,

1 or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).
2 When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the
3 complaint with directions as to curing its deficiencies, unless it is clear from the face of the
4 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
5 F.3d 1103, 1106 (9th Cir. 1995).

6 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint
7 for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is
8 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723
9 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of the claim
10 showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*,
11 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations, it
12 demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause
13 of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265,
14 286 (1986)). The court must accept as true all well-pled factual allegations contained in the
15 complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 556 U.S. at 679.
16 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do
17 not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not crossed the line from
18 conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.
19 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings drafted
20 by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal
21 construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

22 In this case, Plaintiff attempts to bring claims under Title VII of the Civil Rights Act of
23 1964, the 1st Amendment, and the 8th Amendment. *See* Compl. (ECF No. 1-1). The Court will
24 address the sufficiency of those claims below.

25 A. Title VII

26 Plaintiff alleges she was subjected to race, religion, and national origin discrimination and
27 retaliation under Title VII. To sufficiently allege a prima facie case of discrimination in violation
28 of Title VII to survive a § 1915 screening, Plaintiff must allege that: (1) she is a member of a

1 protected class; (2) she was performing according to the Company’s legitimate expectations; (3)
2 she suffered an adverse employment action; and (4) similarly situated individuals outside of her
3 protected class were treated more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,
4 802 (1973); *see also Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003); *Gardner v. LKM*
5 *Healthcare, LLC*, 2012 U.S. Dist. LEXIS 111415 (D. Nev. July 27, 2012).

6 In order to make out a *prima facie* case of retaliation, Plaintiff must show: (1) involvement
7 in a protected activity, (2) a “materially adverse” action, and (3) a causal link between the two.
8 *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) (citing *Payne v. Norwest Corp.*,
9 113 F.3d 1079, 1080 (9th Cir. 1997)); *see also, Burlington Northern & Santa Fe Rwy. Co. v. White*,
10 458 U.S. 53, 68 (2006) (setting forth the “materially adverse” standard). To prove causation,
11 Plaintiff “must show by a preponderance of the evidence that engaging in the protected activity
12 was one of the reasons for the ‘adverse employment decision and that but for such activity’ the
13 adverse employment action would not have occurred.” *See Villiarimo v. Aloha Island Air, Inc.*,
14 281 F.3d 1054, 1064-65 (9th Cir. 2002).

15 To her Complaint, Plaintiff attaches her inquiry questionnaire date stamped as received by
16 the EEOC on October 3, 2017, her charge dated October 3, 2017, and the dismissal and right to
17 sue issued by the EEOC on June 19, 2018. The Court may take judicial notice of these documents.
18 *See, e.g., Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002); *Mack v. South Bay Beer Distribs.*,
19 798 F.2d 1279, 1282 (9th Cir. 1986) (finding that “court[s] may take judicial notice of ‘records
20 and reports of administrative bodies’ ”), *overruled on other grounds by Astoria Fed. Sav. & Loan*
21 *Ass’n v. Solimino*, 501 U.S. 104 (1991); *Mazzorana v. Emergency Physicians Med. Grp., Inc.*,
22 2:12-cv-01837-JCM-PAL; 2013 WL 4040791, at *5 n.3 (D. Nev. Aug. 6, 2013) (taking judicial
23 notice of EEOC proceedings and documents submitted therein). As a result, the Court finds that
24 Plaintiff timely filed this action and exhausted her administrative remedies with respect to her race,
25 and religion claims.

26 However, she also indicated on her complaint that she is asserting a claim for national
27 origin discrimination and no mention of such category is made in her inquiry form or charge. The
28 Court cannot consider incidents of discrimination not included in an EEOC charge “unless the new

1 claims are like or reasonably related to the allegations contained in the EEOC charge.” *Lyons v.*
2 *England*, 307 F.3d 1092, 1104 (9th Cir. 2002) (quotation omitted). A claim is like or reasonably
3 related to allegations in an EEOC charge if the claims “fell within the scope of the EEOC’s actual
4 investigation or an EEOC investigation which can reasonably be expected to grow out of the
5 charge of discrimination.” *Id.* To make this determination, the Court considers factors such as
6 “the alleged basis of the discrimination, dates of discriminatory acts specified within the charge,
7 perpetrators of discrimination named in the charge, and any locations at which discrimination is
8 alleged to have occurred.” *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir.
9 2002) (quotation omitted). Here, the Court cannot find that her national origin discrimination
10 claim is like or reasonably related to the race and religion claims and therefore, finds it was not
11 administratively exhausted. If Plaintiff attempts to amend her complaint and reallege this claim,
12 then she should include factual allegations for the court to determine whether she timely exhausted
13 her administrative remedies.

14 Moreover, Plaintiff’s Title VII discrimination and retaliation claims lack sufficient factual
15 allegations to find she can state a plausible claim for relief. It is not clear whether she has suffered
16 an adverse employment action to state a claim for discrimination and when she engaged in
17 protected activity to state a claim for retaliation. Additionally, she names individual defendants,
18 which is not permitted under Title VII. *See Miller v. Maxwell’s Intern. Inc.*, 991 F.2d 583 (9th
19 Cir. 1993) (“[I]ndividual defendants cannot be held liable for damages under Title VII”). Rather,
20 Plaintiff may only bring suit against her employer, who may be found liable for the actions of its
21 employees under the respondeat superior theory of liability.

22 B. Constitutional Claims

23 Plaintiff next conclusorily states that Defendants violated the 1st and 8th Amendments.
24 However, she fails to allege any factual allegations to identify the basis for these claims. Indeed,
25 Plaintiff has failed to allege that her claims are brought under 42 U.S.C. § 1983, which provides a
26 mechanism for the private enforcement of substantive rights conferred by the Constitution and
27 federal statutes. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Even if Plaintiff had properly
28 raised Section 1983 to assert a violation of the First and Eighth Amendments, Plaintiff did not -

1 allege that Defendants acted under “color of law,” which is not plausible given that Defendants
2 are a private employer and its employees. *West v. Atkins*, 487 U.S. 42, 48-49 (1988).

3 C. Screening Conclusion

4 For the reasons stated above, the complaint does not state a claim for which relief can be
5 granted under either Title VII or the U.S. Constitution. Although it is not clear that the deficiencies
6 identified can be cured, the Court will allow Plaintiff an opportunity to file an amended complaint
7 to the extent she believes she can state a claim.

8 **III. Conclusion**

9 Accordingly, **IT IS ORDERED** that:

- 10 1. Plaintiff’s request to proceed *in forma pauperis* is **GRANTED**. Plaintiff shall not be
11 required to pre-pay the filing fee of four hundred dollars (\$400.00). Plaintiff is
12 permitted to maintain this action to conclusion without the necessity of prepayment of
13 any additional fees or costs or the giving of a security therefor. This order granting
14 leave to proceed *in forma pauperis* shall not extend to the issuance and/or service of
15 subpoenas at government expense.
- 16 2. The Clerk’s Office is **INSTRUCTED** to file Plaintiff’s complaint (ECF No. 1-1) on
17 the docket.
- 18 3. The complaint is **DISMISSED WITHOUT PREJUDICE** providing Plaintiff with
19 leave to amend. Plaintiff will have until **September 19, 2019**, to file an amended
20 complaint, if the noted deficiencies can be corrected. If Plaintiff chooses to amend the
21 complaint, Plaintiff is informed that the Court cannot refer to a prior pleading (i.e., the
22 original complaint) in order to make the amended complaint complete. This is because,
23 as a general rule, an amended complaint supersedes the original complaint. Local Rule
24 15-1(a) requires that an amended complaint be complete in itself without reference to
25 any prior pleading. Once a plaintiff files an amended complaint, the original complaint
26 no longer serves any function in the case. Therefore, in an amended complaint, as in an
27 original complaint, each claim and the involvement of each Defendant must be
28 sufficiently alleged.

1 4. **Failure to comply with this order will result in the recommended dismissal of this**
2 **case.**

3 IT IS SO ORDERED.

4 Dated: August 22, 2019



DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE